No. 91-1328

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In the Supreme Court of the United States

OCTOBER TERM, 1992

THE CITY OF CHICAGO, ET AL., PETITIONERS

v.

ENVIRONMENTAL DEFENSE FUND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act exempts a resource recovery facility's municipal waste combustion ash from regulation as a hazardous waste under Subtitle C of that Act.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioners City of Chicago and its mayor operate a municipal incinerator that burns solid waste and recovers energy, leaving a residue of municipal waste combustion (MWC) ash that is deposited in a landfill. Respondents Environmental Defense Fund, Inc., *et al.* (EDF) brought this action against petitioners, alleging that they were violating provisions of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, by failing to dispose of the MWC ash in accord-

ance with the hazardous waste management requirements of RCRA Subtitle C, 42 U.S.C. 6921-6939. The United States District Court for the Northern District of Illinois granted summary judgment for petitioners, ruling that RCRA Section 3001(i), 42 U.S.C. 6921(i), exempts the ash residue from Subtitle C regulation. See Pet. App. 18a-33a. A divided court of appeals reversed. *Id.* at 1a-17a.

1. RCRA is a comprehensive environmental statute that, among other things, grants the Environmental Protection Agency (EPA) authority to regulate hazardous wastes from "cradle to grave." *Environmental Defense Fund, Inc.* v. *EPA*, 852 F.2d 1316, 1318 (D.C. Cir. 1988), cert. denied, 489 U.S. 1011 (1989). Subtitle C of RCRA requires EPA to identify and list hazardous wastes, § 3001, 42 U.S.C. 6921, and to promulgate standards governing hazardous waste generators and transporters, §§ 3002, 3003, 42 U.S.C. 6922, 6923, and owners and operators of hazardous waste treatment, storage, and disposal facilities, § 3004, 42 U.S.C. 6924. EPA has directed hazardous waste generators to comply with handling, recordkeeping, storage, and monitoring requirements when they treat, store, or arrange for transportation or disposal of hazardous waste. See 40 C.F.R. Pt. 262.

In 1980, EPA issued regulations, pursuant to Section 3001 of RCRA, identifying and listing certain solid wastes as hazardous wastes. See 45 Fed. Reg. 33,084. Based on the agency's interpretation of Congress's intent, EPA excluded various solid wastes that might otherwise be treated as hazardous waste from regulation under Subtitle C. See *id.* at 33,096-33,097. EPA specifically provided a "household waste exclusion," stating in relevant part:

The following solid wastes are not hazardous wastes:

> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels.)

45 Fed. Reg. at 33,120 (codified as amended at 40 C.F.R. 261.4(b)(1) (1982)). See Pet. App. 21a-22a.

Four years later, Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221, which revised and supplemented RCRA in various respects. That Act added Section 3001(i), entitled "Clarification of household waste exclusion." 42 U.S.C. 6921(i). Section 3001(i) states:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if —
>
> (1) such facility —
>
> (A) receives and burns only —
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> (B) does not accept hazardous wastes identified or listed under this section, and
>
> (2) the owner or operator of such facility has established contractual requirements or other

> appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. 6921(i). Shortly thereafter, EPA revised its regulation containing the "household waste exclusion." 50 Fed. Reg. 28,702 (1985). EPA retained its original regulatory language, but added the language of Section 3001(i) virtually verbatim. See 40 C.F.R. 261.4(b)(1). See Pet. App. 22a-23a.

2. Since 1971, petitioner City of Chicago has owned and operated a resource recovery incinerator, the Northwest Waste-to-Energy Facility. The facility burns approximately 350,000 tons of solid waste each year, amounting to about 14% of the City's solid waste, and produces energy that is both used within the facility and sold to other companies. The City disposes of the combustion residue—110,000 to 140,000 tons of MWC ash per year—at a landfill in Three Oaks, Michigan. Prior to this suit, the City, like many other municipalities, did not manage MWC ash as an RCRA Subtitle C hazardous waste. Pet. App. 1a-3a, 19a.[1]

In 1988, EDF filed a complaint against petitioners under the citizen suit provisions of RCRA, § 7002, 42 U.S.C. 6972, alleging that petitioners were violating RCRA and EPA's RCRA regulations governing the management of hazardous waste. According to EDF, the MWC ash from the Northwest Waste-to-Energy Facility contained sufficient levels of lead and cadmium to subject the residue to regulation as a hazardous waste under RCRA Subtitle C. Petitioners responded that RCRA

[1] As of 1991, approximately 150 facilities incinerated municipal solid waste in a resource recovery facility. S. Levy, *Municipal Waste Combustion Inventory* 1 (EPA July 1992). In 1990, those facilities burned in aggregate approximately 29.7 million tons of municipal solid waste out of an estimated 195.7 million tons generated. *Characterization of Municipal Solid Waste in the United States: 1992 Update* 3-2 (EPA July 1992). See also Pet. 2-3.

Section 3001(i) excluded the MWC ash from Subtitle C requirements. The parties filed cross-motions for summary judgment contesting the application of Section 3001(i). Pet. App. 2a-3a, 18a-20a.

EDF claimed that although Section 3001(i) exempted the City's incineration of municipal solid waste from RCRA Subtitle C requirements related to "treating, storing, disposing of, or otherwise managing hazardous wastes," 42 U.S.C. 6921(i), it did not exempt the City from Subtitle C requirements related to generation of a distinct waste product, the MWC ash. Petitioners responded that Section 3001(i)'s reference to "disposing of, or otherwise managing hazardous wastes" exempted the entire process of incinerating the waste in a resource recovery facility, including management of the ash residue. Pet. App. 3a, 20a, 23a-24a.

The district court agreed with petitioners that RCRA Section 3001(i) exempts MWC ash produced at resource recovery facilities from regulation as hazardous waste. Pet. App. 3a, 20a-28a. The court denied petitioners' motion for summary judgment, however, and allowed EDF to engage in discovery on whether the Chicago facility adequately met Section 3001(i)'s provisions prohibiting the facility from accepting commercial and industrial hazardous wastes. Pet. App. 3a, 28a-29a. EDF subsequently stipulated that it would not contest the adequacy of the facility's compliance with those prohibitions and that it would not oppose petitioners' renewed motion for summary judgment, which the court granted. See *id.* at 3a-4a, 30a-33a.

3. The court of appeals reversed. As a preliminary matter, the court rejected petitioners' claim that intervening legislation had rendered the matter moot. Pet. App. 4a-5a. Turning to the merits, the court observed that petitioners and EDF both relied on the "plain words of section 3001" and that "EPA's interpretation and the legislative history of the statute do little to resolve this stand-off." *Id.* at 6a-7a. See *id.* at 7a-14a (analyzing

those sources). The court ultimately chose to rely on "what the statute actually says." *Id.* at 14a.

The court reasoned that Section 3001(i) "mentions 'the treating, storing, disposing of or otherwise managing' of the household and commercial waste, but fails to include among those activities *generating* a different waste product entirely." Pet. App. 14a. The court examined the statutory definitions of the quoted terms and determined that they "exclude 'generation,' which is separately defined as 'the act or process of producing hazardous waste.' 42 U.S.C. 6903(6)." *Id.* at 15a. It concluded:

> There is no overlap whatsoever then between hazardous waste "management" and hazardous waste "generation." It follows, therefore, that if the language of the exclusion is limited to "management" activities of resource recovery facilities, "generating" activities are subject to regulation.

Id. at 15a-16a. The court accordingly held that "ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA." *Id.* at 16a.

Judge Ripple dissented. He would have affirmed the judgment for the reasons set forth in *Environmental Defense Fund, Inc.* v. *Wheelabrator Technologies, Inc.*, 725 F. Supp. 758 (S.D.N.Y. 1989), aff'd, 931 F.2d 211 (2d Cir.), cert. denied, 112 S. Ct. 453 (1991), which held that MWC ash from resource recovery facilities is exempt from regulation under Subtitle C. Pet. App. 17a.[2]

[2] Because of the apparent conflict with the *Wheelabrator* decision, the court of appeals' opinion was circulated among all active circuit judges prior to release. No judge requested rehearing en banc. See Pet. App. 1a n.*

DISCUSSION

Petitioners seek review of the court of appeals' determination that MWC ash from resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA. They contend that the court's decision is incorrect, that it raises an important question of federal statutory law, and that it is in square conflict with the Second Circuit's decision in *Environmental Defense Fund, Inc.* v. *Wheelabrator Technologies, Inc.*, 931 F.2d 211 (1991), aff'g 725 F. Supp. 758 (S.D.N.Y. 1989), cert. denied, 112 S. Ct. 453 (1991). See Pet. 9-10. Respondents reply that the court's decision is correct, but they agree that the issue is important and a circuit conflict exits, and they accordingly urge that the petition for a writ of certiorari should be granted. EDF Br. 8. In light of recent regulatory developments, we suggest that the petition should be granted, the decision vacated, and the case remanded to the court of appeals for further consideration.

1. As the court of appeals observed, petitioners and EDF both contend that the plain language of Section 3001(i) supports the diametrically different interpretations they advocate. See Pet. App. 6a-7a; Pet. 12; EDF Br. 14-15. We believe, however, that the statutory language is ambiguous with respect to the precise issue presented here. Section 3001(i) states that a resource recovery facility "recovering energy from the mass burning of municipal solid waste" shall not be deemed "to be treating, storing, disposing of, or otherwise managing hazardous wastes" if certain conditions (including limitations on what wastes the facility "receives and burns") are met. 42 U.S.C. 6921(i). But it is unclear from the statutory text whether "recovering energy from the mass burning of municipal solid waste" describes the entire recovery process—including disposal of ash residue—or something less.

If Congress intended that Section 3001(i) apply to the entire resource recovery process, the statute would ex-

empt from Subtitle C regulation "treating, storing, disposing of, or otherwise managing" the ash residue. If Congress intended, however, that Section 3001(i) apply to some more limited part of the process—such as only the incineration itself—the statute arguably would not exempt disposal of the incineration residue from Subtitle C regulation. As the lower courts have acknowledged, the statutory text is "subject to varying interpretations" (Pet. App. 12a) and does not provide a definitive answer to Congress's intent. See *Wheelabrator*, 725 F. Supp. at 764. Simply put, Congress has "not directly spoken to" the precise question presented in this case. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). In that situation, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844.[3]

At the time that the court of appeals considered this case, EPA's position on application of Section 3001(i) to MWC ash was subject to controversy. When EPA promulgated its 1980 household waste exclusion, it clearly contemplated that the regulatory exclusion would exempt incineration residue from Subtitle C regulation. EPA stated in the preamble to that regulation that it was excluding the entire household waste stream from regulation, observing:

> Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste.

[3] As this Court has explained, "when an agency is charged with administering a statute, part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities." *Department of the Treasury* v. *FLRA*, 494 U.S. 922, 933 (1990). "That is a task infused with judgment and discretion, requiring the 'accommodation of conflicting policies that were committed to the agency's care.'" *Ibid.*

45 Fed. Reg. 33,099 (1980). EPA explained that such wastes, however, "must be transported, stored, treated and disposed in accord with applicable State and federal requirements concerning management of solid waste (including any requirements specified in regulations under Subtitle D of RCRA)." *Ibid.*

Five years later, when EPA amended the household waste exclusion in response to Congress's enactment of Section 3001(i), EPA expressed doubt whether MWC ash derived from both household and nonhazardous commercial and industrial waste should be excluded. EPA stated in the preamble to the amended regulation:

> The statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic [of hazardous waste]. The legislative history does not directly address this question, although the Senate report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residues.

50 Fed. Reg. 28,725-28,726 (1985). The agency continued:

> EPA believes that the principal purpose of section 3001[i] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result, from becoming subject to the Subtitle C regulations. EPA does not see in this provision an intent to exempt the

> regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste.

Id. at 28,726. See Pet. App. 26a n.4[4]

Since 1985, EPA officials have indicated that the analysis contained in the 1985 regulatory preamble may be incorrect and have suggested that Congress clarify its intent.[5] Congress subsequently included a provision

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[4] EPA also stated, however, that the Hazardous and Solid Waste Amendments do not "impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities." 50 Fed. Reg. 28,726 (1985). EPA determined that "any additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arose about the residues." *Ibid.*

[5] In 1987, EPA's Assistant Administrator for the Office of Solid Waste and Emergency Response stated to a Senate subcommittee that "[t]he Agency has reexamined that [1985] interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C." *Resource Conservation and Recovery Act—Oversight: Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Senate Comm. on Environment and Public Works*, 100th Cong., 1st Sess. 427-428 (1987). See Pet. App. 10a-11a, 27a. In 1988, the Administrator testified to a House subcommittee that "there is ambiguity within the law and I think the law should be clarified." *Municipal Incinerator Ash: Hearing on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 72 (1988). In 1989, EPA's Director of the Office of Solid Waste stated to a House subcommittee that EPA continued to follow the 1985 interpretation, but she noted that there is "substantial controversy surrounding that interpretation," "the law is ambiguous given it is silent with regard to treatment of ash under [Section 3001(i)]," and "it needs to be clarified." *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before*

in the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, stating:

> For a period of 2 years [until November 15, 1992] * * * ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to section 3001 of the Solid Waste Disposal Act.

§ 306, 104 Stat. 2584. Since enactment of that provision, however, Congress has taken no action to clarify whether it intends MWC ash to be exempt permanently from Subtitle C regulation.[6]

In light of the considerable uncertainty surrounding the issue, EPA's Administrator recently issued a policy directive to clarify the agency's interpretation of Section 3001(i). See App., *infra*, 1a-10a. The Administrator's directive, issued to all EPA Regional Administrators and made publicly available, announces EPA's decision under Section 3001(i) of RCRA "to treat ash gener-

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the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 33 (1989). See Pet. App. 11a-12a. See also *Wheelabrator*, 725 F. Supp. at 767-768.

[6] In the past several years, Congress has had before it various provisions that would clarify how MWC ash should be regulated. In 1986, Congress considered legislation that would have required specific standards for facilities disposing of MWC ash. See 53 Fed. Reg. 33,314, 33,328 (1988). In 1988, a bill was introduced that would have allowed disposal of MWC ash in certain RCRA Subtitle D landfills that met additional requirements (the so-called "D Plus" approach). See *Municipal Incinerator Ash: Hearing on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 72 (1988). See also Pet. App. 8a-9a. In its recently concluded Session, Congress considered a bill that would amend RCRA Subtitle D to establish a separate regulatory framework for MWC ash. When Congress adjourned, that provision remained only in the Senate version of the bill. See S. Rep. No. 301, 102d Cong., 2d Sess. 56-60 (1992).

ated from the combustion of nonhazardous municipal solid waste at resource recovery facilities * * * as exempt from hazardous waste regulation under RCRA Subtitle C." App., *infra*, 1a-2a. That decision "supersedes the Agency's earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation." *Id.* at 2a.

2. EPA's decision that Section 3001(i) exempts MWC ash from RCRA Subtitle C regulation is a significant regulatory development bearing on the courts' interpretation of the statute. Under *Chevron*, a court interpreting a statute administered by an agency must give deference to the agency's interpretation if that interpretation is "reasonable." *Chevron*, 467 U.S. at 844. See, *e.g.*, *United States* v. *Alaska*, 112 S. Ct. 1606, 1610 (1992); *Pauley* v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); *Pension Ben. Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 647-648 (1990); *Sullivan* v. *Everhart*, 494 U.S. 83, 88-89 (1990); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 722 (1989). As this Court has explained, the principle of deference to administrative interpretations

> has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulation.

Chevron, 467 U.S. at 844 (citations omitted).

Chevron's well-settled analysis applies here. The Administrator's directive expresses the expert agency's view on the meaning of an ambiguous provision of a complex statute. As the directive explains, EPA's decision attempts to reconcile the text of Section 3001(i), its legislative history, and the underlying policies of RCRA, which include the goals of protecting the environment and promoting resource recovery from nonhazardous

solid waste. See App., *infra*, 2a-10a. The directive clarifies the agency's interpretation of Section 3001(i) with respect to the issue presented in this case. The proper inquiry now is whether the agency's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-843. See *Alaska*, 112 S. Ct. at 1610; *LTV Corp.*, 496 U.S. at 648; *Mead Corp.*, 490 U.S. at 722. More precisely, the question is whether the agency's interpretation is "reasonable," *Pauley*, 111 S. Ct. at 2537, in the sense that it is "rational and consistent with the statute." *Everhart*, 494 U.S. at 89, quoting *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987).

3. We suggest that this Court grant the petition for a writ of certiorari, vacate the judgment, and remand the case to the court of appeals for further consideration in light of the Administrator's policy directive. Although this Court could itself undertake the *Chevron* analysis, the more appropriate course would be to allow the court of appeals to make that inquiry in the first instance—particularly because no appellate court has considered the issue in light of the Administrator's recent directive. See, *e.g.*, *Holland* v. *First Virginia Banks, Inc.*, 112 S. Ct. 1152 (1992) (remanding for further consideration in light of the Civil Rights Act of 1991); *State Tax Comm'n* v. *Herzog Bros. Trucking, Inc.*, 487 U.S. 1212 (1988) (remanding for further consideration in light of proposed state regulations); *Oberly* v. *Baltimore & O. R.R.*, 479 U.S. 980 (1986) (remanding for further consideration in light of position asserted by the United States as amicus curiae).

Significantly, the court of appeals did not purport to engage in a *Chevron* analysis. That court apparently concluded that statements contained in the 1980 and 1985 RCRA Federal Register notices and subsequent statements by EPA officials to congressional subcommittees, see pp. 8-11, *supra*, failed to articulate an unequivocal agency position on the matter to which deference could

be accorded. See Pet. App. 12a (stating that "[t]he see-sawing statements from the EPA to which the district court gave 'little weight' deserve no weight at all"). The Administrator's policy directive, however, eliminates any doubt as to the agency's position on the question posed here and calls for application of the principles this Court expressed in *Chevron*.[7]

Because the Administrator's decision is likely to affect this case significantly, it would be appropriate to remand the case to the court of appeals for further consideration in light of his policy directive. A remand would facilitate final resolution by allowing the court of appeals to consider and resolve in the first instance the parties' arguments concerning the applicability of *Chevron*. If on remand the court of appeals affords *Chevron* deference to EPA's interpretation, the existing conflict between the Second Circuit's decision in *Wheelabrator* and the Seventh Circuit's decision in this case will be eliminated, thereby obviating the need for further review by this Court. We believe that outcome is likely, because under proper application of *Chevron* principles, EPA's interpretation of Section 3001(i) should be upheld. The reasons are these.

EPA's interpretation of Section 3001(i) is both "rational and consistent with the statute." *Everhart*, 494 U.S. at 89. As the Administrator's directive explains, Congress enacted Section 3001(i) to clarify EPA's 1980 household waste exclusion, which exempted household waste from Subtitle C regulation "in all phases of its management, [including] residues remaining after treatment (e.g., incineration, thermal treatment)." 45

[7] The Administrator's directive to EPA's Regional Administrators is a binding interpretation that establishes agency policy and is therefore a legitimate source for *Chevron* deference. See *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988). Cf. *Alaska*, 112 S. Ct. at 1618-1619, citing *United States* v. *Gaubert*, 111 S. Ct. 1267, 1274 (1991) (agencies may establish policy "through administration of agency programs").

Fed. Reg. 33,099 (1980). See App., *infra*, 2a-3a. Section 3001(i) makes clear that when a resource recovery facility incinerates household waste in combination with nonhazardous commercial and industrial waste and in compliance with prescribed requirements, the facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes." 42 U.S.C. 6921(i). See App., *infra*, 3a-4a. In other words, the household waste exclusion, which exempts household waste "in all phases of its management" (45 Fed. Reg. 33,099 (1980)), continues to apply when a resource recovery facility commingles household waste with other nonhazardous waste and treats, stores, disposes of, or otherwise manages the combined waste streams.

As the Administrator's directive explains, his interpretation is entirely consistent with the statute. See App., *infra*, 2a-4a. Indeed, Section 3001(i)'s express provision that a qualifying resource recovery facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" strongly suggests that EPA's household waste exclusion applies to all facets of the facility's operations, including incineration, pre- and post-incineration storage, and disposal of residues. The fact that Section 3001(i) fails to state that the facility shall not be deemed to be "generating" hazardous wastes (see Pet. App. 15a-16a) does not undermine that conclusion. The absence of that term likely reflects Congress's understanding that resource recovery operations involving conversion of solid waste to energy are comprehensively described by the collective terms it used. See RCRA § 1004(7) and (34), 42 U.S.C. 6903(7) and (34) (defining hazardous waste management and treatment). At most, Congress's silence on that point highlights the fact that Congress has "left a gap for the agency to fill." *Chevron*, 467 U.S. at 843-844. See App., *infra*, 4a n.2.

The Administrator's interpretation of Section 3001(i) is especially compelling when the statute is viewed in its

legal context. When Congress acted, it presumably was aware that EPA interpreted the household waste exclusion to apply to such waste "in all phases of its management," including disposal of incineration residues. See 45 Fed. Reg. 33,099 (1980).[8] Congress did not question or overrule that interpretation when it clarified that the household waste exclusion would apply to a resource recovery facility that burns commingled wastes. And to the extent the legislative history is relevant, it indicates that, in enacting Section 3001(i), Congress intended to retain EPA's interpretation and to apply that interpretation to such commingled wastes. S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). See App., *infra*, 4a-6a & nn.2-3.

The Administrator's interpretation also is consistent with the objectives Congress sought to achieve in enacting Section 3001(i)—protecting the environment and promoting resource recovery from nonhazardous solid waste. See App., *infra*, 6a-7a. Based on EPA's scientific judgment and the safeguards the agency has instituted in implementing other provisions of RCRA, the Administrator has determined that those objectives "are best served by exempting MWC ash from hazardous waste regulation." *Id.* at 7a-8a. That determination rests on "significant expertise" and "entail[s] the exercise of judgment grounded in policy concerns." *Pauley*, 111 S. Ct. at 2534. "In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations." *Ibid.* See *Chevron*, 467 U.S. at 844-845, quoting *United States* v. *Shimer*, 367 U.S. 374, 382 (1961).[9]

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[8] Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) ("where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute").

[9] This Court has stated that as a general matter, "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley*,

In sum, it is likely that the court of appeals would give deference to the Administrator's determination that MWC ash is exempt from regulation under RCRA Subtitle C. If the court of appeals defers to the Administrator, it will eliminate the circuit conflict and obviate any need for review by this Court. We therefore suggest that the Court grant the petition, vacate the judgment, and remand the case to the court of appeals for reconsideration in light of the Administrator's policy directive.

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111 S. Ct. at 2535. In this case, however, the EPA has consistently recognized that Section 3001(i) is silent or ambiguous with respect to the issue presented here. See pp. 9-10 & note 5, *supra*. Thus, EPA has always acknowledged that there is a statutory gap that must be filled, and the fact that EPA's interpretation has evolved over time is by itself no reason to deny deference. As the Court has explained, "[a]n initial agency interpretation is not instantly carved in stone." *Chevron*, 467 U.S. at 863. Rather, the agency "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-864. Accord *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). The question for the reviewing court remains whether the agency's interpretation is "reasonable," *Pauley*, 111 S. Ct. at 2537, in the sense that it is "rational and consistent with the statute." *Everhart*, 494 U.S. at 89.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of the EPA Administrator's policy directive determining that MWC ash is exempt from regulation as a hazardous waste under RCRA Subtitle C.

Respectfully submitted.

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OCTOBER 1992

APPENDIX

[SEAL] UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Washington, D.C. 20460

[Sept. 18, 1992]

The Administrator

MEMORANDUM

TO: All Regional Administrators

SUBJECT: Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i)

PURPOSE

This Memorandum sets forth the United States Environmental Protection Agency's ("EPA" or "Agency") decision under section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i),[1] to treat ash generated from the

[1] As part of the Hazardous and Solid Waste Amendments of 1984, Congress amended RCRA by adding section 3001(i), which provides, in pertinent part:

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for purposes of regulation under [Subtitle

combustion of nonhazardous municipal solid waste at resource recovery facilities (hereinafter "MWC ash") as exempt from hazardous waste regulation under RCRA Subtitle C. EPA believes that MWC ash can be regulated in a manner that will be protective of human health and the environment under RCRA Subtitle D. The determination set forth herein supersedes the Agency's earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation. *See* 50 Fed. Reg. 28702, 28725-26 (1985).

ANALYSIS

Text of the Statute

EPA's determination that MWC ash is exempt from hazardous waste regulation is consistent with the text of section 3001(i) As proclaimed by the title of section 3001(i)—"Clarification of household waste exclusion"—in enacting that provision, Congress was building upon the regulatory framework it earlier had established. In enacting RCRA in 1976, Congress indicated that solid waste from households, which frequently includes materials that may contain hazardous constituents, should not be regulated as hazardous waste under Subtitle C. S. Rep. No. 94-988, 94th Cong., 2d Sess. 16 (1976). EPA codified Congress' intent in the so-called "household waste exclusion,"

C] if . . . such facility . . . receives and burns only . . . household waste . . . and solid waste from commercial or industrial sources that does not contain hazardous waste . . . .

RCRA section 3001(i)(1), 42 U.S.C. § 6921(i)(l). Section 3001(i) is codified in EPA's regulations as part of the household waste exclusion. 40 C.F.R. 261.4(b)(l).

promulgated in 1980, which provides that "any material . . . derived from households . . . is not hazardous waste . . . ." 40 C.F.R. 261.4(b)(1).

In the preamble to the Federal Register notice announcing the household waste exclusion, EPA clearly stated that the exclusion extends to ash remaining after household waste is incinerated: "Since household waste is excluded in all phases of its management, residues after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33066, 33098 (1980). The Agency justified its determination that ash derived from the incineration of household waste is subject to the exclusion on the ground that Congress intended to "exclude *waste streams* generated by consumers at the household level." *Id.* (emphasis added).

In enacting section 3001(i), Congress arguably extended the regulatory exclusion for ash derived from the incineration of household waste to similar residues generated by resource recovery facilities from the incineration of household waste *and* nonhazardous commercial and industrial solid waste. To the extend that household waste alone is incinerated, section 3001(i) coincides with EPA's earlier interpretation of the household waste exclusion as exempting ash derived from such waste from hazardous waste regulation. The inclusion in section 3001(i) of nonhazardous commercial and industrial waste, along with household waste, suggests that Congress may have intended that MWC ash resulting from the combustion of those combined wastes also should not be subject to regulation as a hazardous waste.

In addition, congressional intent to exempt MWC ash from hazardous waste regulation is suggested by the portion of section 3001(i) which provides that a

resource recovery facility shall not be deemed to be "treating, storing *disposing of*, or otherwise managing" hazardous waste. (Emphasis added.) Nothing ordinarily is "disposed of" when a resource recovery facility receives or stores a nonhazardous solid waste, and the burning of such waste generally is regarded as a type of treatment under RCRA. *See* RCRA sections 1004(3) and (34), 42 U.S.C. § 6903(3) and (34) (definitions of "disposal" and "treatment"). As a result, since MWC ash ordinarily is the only waste "disposed of" by such a facility, Congress arguably intended that MWC ash not be regarded as a hazardous waste.

For the foregoing reasons, EPA believes that the text of section 3001(i) is consistent with the Agency's determination that MWC ash is exempt from hazardous waste regulation.

Legislative History

EPA's determination that MWC ash is exempt from hazardous waste regulation also is consistent with the legislative history of section 3001(i). First, a Report of the Senate Committee on Environmental and Public Works addressing section 3001(i) specifically states that "[a]ll waste management activities of such a [resource recovery] facility, including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion."[2] S. Rep.

[2] Unlike the legislative history for section 3001(i), the statute does not expressly state that the "generation" of waste by a resource recovery facility is included within the exemption. At most, the absence of that term reflects that Congress did not expressly address the precise issue of whether MWC ash should be exempt from hazardous waste regulation, and does not indicate that Congress intended that MWC ash be

No. 98-284, 98th Cong., 1st Sess. 61 (1983) (emphasis added).[3] Since MWC ash ordinarily is the only waste "generated" by a resource recovery facility, Congress arguably demonstrated its intent that MWC ash not be regarded as a hazardous waste.

Second, the Senate Report states that section 3001(i) was enacted to "encourage commercially viable resource recovery facilities and . . . remove impediments that may hinder their development and operation." S. Rep. No. 98-284, 98th Cong., 1st Sess. 61 (1983). As noted above, one of the significant features of section 3001(i) is that it applies to resource recovery facilities that burn both household waste *and* nonhazardous commercial and industrial waste. If section 3001(i) were interpreted as not exempting MWC ash derived from the incineration of combined household waste and nonhazardous commercial and industrial waste from regulation as hazardous waste, the policy goal stated in the Senate Report could be substantially frustrated. As a practical matter, the cost benefit to a resource recovery facility in being able to burn both household and nonhazardous commercial and industrial waste would be significantly reduced if MWC ash must be disposed of as a hazardous waste, as discussed more fully below.

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regulated as a hazardous waste. In such a circumstance, the Agency has discretion to adopt a reasonable interpretation that best serves the goals embodied in section 3001(i). EPA has exercised that discretion in adopting the interpretation set forth herein, as discussed more fully below.

[3] The Senate Report is entitled to special weight because the Conference Committee adopted, without change, the Senate version of section 3001(i). H.R. Rep. No. 98-1133, 98th Cong., 2d Sess. 106 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5677. In passing the Senate version of section 3001(i), Congress also impliedly adopted the Senate's interpretation of that provision set forth in the Senate Report.

Third, the Senate Report refers to the wastes being incinerated in resource recovery facilities as "waste streams," as follows:

> Resource recovery facilities often take in . . . "household wastes" mixed with other non-hazardous *waste streams* from a variety of sources other than "households." . . . New section 3001[i] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

Id. (emphasis added). As noted above, the Agency justified its determination that ash derived from the incineration of household waste is excluded from hazardous waste regulation on the ground that Congress intended to "exclude *waste streams* generated by consumers at the household level." 45 Fed. Reg. 33066, 33098 (1980) (emphasis added). In also using the term "waste stream" in the Senate Report, Congress arguably demonstrated its intent that section 3001(i) be construed as extending the household "waste stream" exclusion to the entire "waste stream" at a resource recovery facility, including MWC ash derived from the burning of combined household *and* nonhazardous commercial and industrial waste.

In sum, the legislative history of section 3001(i) is consistent with the Agency's determination to exempt MWC ash from hazardous waste regulation.

Policy Considerations

As discussed above, EPA believes that the text and legislative history of section 3001(i) are consistent with the Agency's view that MWC ash is exempt from

hazardous waste regulation. Since Congress did not in the statute or legislative history expressly address the precise issue of whether MWC ash should be exempt from hazardous waste regulation, the Agency has discretion to adopt a reasonable interpretation that best serves the goals embodied in section 3001(i). EPA has exercised that discretion in adopting the interpretation set forth herein. EPA believes that the two statutory goals embodied in section 3001(i)—protecting the environment and promoting resource recovery from nonhazardous solid waste—are best served by exempting MWC ash from hazardous waste regulation.

EPA has determined that MWC ash can be regulated in a manner that will be protective of human health and the environment under Subtitle D. In particular, EPA recently promulgated new criteria for municipal solid waste landfills at 40 C.F.R. Part 258, 56 Fed. Reg. 50978 (1991). Municipal landfills and monofills receiving MWC ash must comply with those criteria.[4] The Part 258 criteria impose requirements on municipal landfills that far exceed those previously imposed, including more stringent location restrictions, facility design and operating criteria, ground-water monitoring requirements, corrective action requirements, financial assurance requirements, and closure and post-closure care

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[4] In the preamble to the Federal Register notice announcing the final Part 258 criteria, EPA stated that "[t]he purpose of part 258 is to establish minimum national criteria for municipal solid waste landfills, including [such landfills] used for . . . disposal of nonhazardous municipal waste combustion (MWC) ash (whether the ash is co-disposed or disposed of in an ash monofill)." *See also* response to comment document nos. 155, 168, 171, 172, and 199 in the public record for the Part 258 rulemaking (docket number F-91-CMLF-FFFFF).

requirements. The Agency believes the disposal of MWC ash in municipal landfills subject to the Part 258 criteria will be protective of human health and the environment.[5]

If information comes to EPA's attention suggesting that MWC ash is being managed or disposed of in a manner that is not protective of human health and the environment under Subtitle D, the Agency will consider additional actions, including providing technical assistance, issuing guidance documents, and, if appropriate, promulgating additional regulations to address those situations. In addition, at individual sites, if the disposal of MWC ash may present an imminent and substantial endangerment to human health or the environment, EPA may require responsible persons to undertake appropriate action under section 7003(a) of RCRA, 42 U.S.C. § 6973(a).

Resource recovery from municipal solid waste is an important component of EPA's integrated waste management approach, which involves the complementary use of a variety of practices to safely and effectively manage municipal solid waste.[6] Such activ-

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[5] The promulgation of the Part 258 criteria is an important step in ensuring that MWC ash can and will be regulated in a manner that will be protective of human health and the environment under Subtitle D. The promulgation of those criteria also has served as an impetus for the Agency's reevaluation of its earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation. 50 Fed. Reg. 28702, 28725-26 (1985).

[6] That approach establishes a hierarchy that prefers source reduction (i.e., the design, manufacture, purchase, or use of materials to reduce the amount or toxicity of solid waste generated) and recycling (i.e., the process by which materials are collected and used as raw materials for new products) over solid waste combustion (including combustion for resource recovery) and landfilling. Solid waste combustion, however, has

ity advances the statutory objective of RCRA (the *Resource* Conservation and *Recovery* Act) to reduce the volume of waste that requires disposal. *See id.* at section 1002(b)(8), 42 U.S.C. § 6901(b)(8). It also advances the statutory objective of recovering significant amounts of energy from solid waste. *See id.* at sections 1002(d)(2), 42 U.S.C. § 6901(d)(2), and 1003(a)(11), 42 U.S.C. § 6902(a)(11). For those reasons, EPA agrees with Congress' view, set forth in the Senate Report discussed above, that impediments hindering the development and operation of commercially viable resource recovery facilities should be eliminated where practicable.

For nonhazardous municipal solid waste that can be disposed of either in a Subtitle D landfill or combusted in a resource recovery facility, the comparative economic desirability of those two alternatives significantly is impacted by the application of section 3001(i) to MWC ash.[7] If MWC ash is not exempt under 3001(i) from hazardous waste regulation, a strong economic incentive may exist to dispose of raw municipal solid waste in Subtitle D landfills, rather than combust that waste in resource recovery facilities. The costs associated with the disposal of MWC ash in Subtitle C facilities are dramatically higher than in

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played and will continue to play an important role in the Agency's integrated waste management approach because the entire solid waste stream cannot be reduced through source reduction and recycling. EPA encourages communities to choose the mix of solid waste options that are most appropriate for them, considering local economic, environmental, and other factors.

[7] In addition to cost, Subtitle D landfill capacity limitations also may be a significant factor in determining whether municipal solid waste is combusted in resource recovery facilities.

Subtitle D landfills. Although costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold difference between the cost of disposal of MWC ash in a Subtitle C facility compared to a Subtitle D landfill: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately $453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately $42.00 per ton. For states that combust substantial portions of their solid waste (in resource recovery and other combustion facilities), such as Connecticut (65%), Massachusetts (47%), and Maine (45%), this cost differential could be enormous.

CONCLUSION

In sum, exempting MWC ash from hazardous waste regulation is consistent with the text and legislative history of section 3001(i), and best serves the statutory goals embodied in that provision of protecting the environment and promoting resource recovery from nonhazardous solid waste. For the foregoing reasons, EPA has determined that MWC ash is exempt from regulation as a hazardous waste under RCRA Subtitle C.

/s/ William K. Reilly
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